No. 3895

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KATE I. D'ALERIA,
Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY (his wife),
Defendants in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

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Introduction.

This is an action that was instituted by the defendants in error, as plaintiffs, against Harold A. Adrian and Kate Nixon, sometimes known as Mrs. George Nixon, as defendants, to recover from said defendants the sum of $40,000.00 for personal injuries alleged to have been suffered by the said Jennie Shirey by and through their carelessness and negligence, and to recover from them for and on behalf of the said Charles Shirey the sum of $11,013.00 damages for loss of services of his wife and for expenses incurred.

Amended Complaint, pages 1 to 12 of Transcript.

The case went to trial before the Court sitting with a jury, the Honorable Frank H. Rudkin presiding, on the amended complaint of the plaintiffs, the answer thereto of the defendant Kate Nixon and the supplemental complaint of the defendants in error, it being alleged in said supplemental complaint that the true name of the defendant Harold A. Adrian is Armand d'Aleria (his true name is Armand M. d'Aleria), and that since the commencement of the action he and the defendant Kate Nixon had married and were then husband and wife.

Amended Complaint, pages 1 to 12 of Transcript;

Answer to Amended Complaint, pages 12 to 21 of Transcript;

Supplemental Complaint, pages 21 to 24 of Transcript;

Notice of Intention, etc., and Refusal, pages 34 and 35 of Transcript.

No answer was served or filed in said cause by or on behalf of the defendant Harold A. Adrian, either under that name or under his true name of Armand M. d'Aleria, or otherwise, nor was any appearance made by him or for or on his behalf, at the trial of said cause.

When the case was closed after the introduction of evidence, this plaintiff in error requested the Court to give to the jury the following instruction, to-wit:

"You are hereby instructed that the plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon, you find a verdict in her favor and against the plaintiffs,"

Page 70 of Transcript,

which request was refused, whereupon said plaintiff in error duly excepted to such refusal, as appears by the bill of exceptions contained in the transcript herein.

Page 64 of Transcript.

The Court then gave to the jury the instructions which appear on pages 56 to 64, inclusive, of said transcript, whereupon said jury retired for deliberation and thereafter rendered a verdict as follows, to-wit:

"We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey..$10,000.00
2. For plaintiff Charles Shirey for lost services of wife and expenses 2,000.00

Total.....$12,000.00.

Jas. W. Harris,
Foreman."

Verdict, page 26 of Transcript.

And thereafter and in accordance with said verdict, judgment was made and entered in said cause in favor of the plaintiffs therein and against the defendants.

Pages 26 and 27 of Transcript.

Thereafter this plaintiff in error petitioned the Court for a new trial of said cause, which petition was denied, as is evidenced by the opinion of said Court on pages 30 to 34, inclusive, of the transcript of record herein; and within the time allowed by law, the stipulations of the parties, and the orders of the Court, such proceedings and taken by this plaintiff in error as were necessary to bring said cause before this Court for hearing on a writ of error (which said writ of error has been and is being prosecuted by her alone for the reason that her codefendant refused to join with her in her application therefor, as appears by the notice of intention, etc., and refusal on pages 34 and 35 of said transcript), it being the contention of said plaintiff in error that the judgment made and entered against her in said cause should be reversed, and the trial Court directed to make and enter judgment therein in her favor, on the grounds and for the reasons set forth and stated in the assignment of errors served and filed therein by her, which appears on pages 69 to 75, inclusive, of said transcript as follows:

1. That the evidence introduced at the trial of said cause was, and is, insufficient to justify the verdict of the jury.

2. That the trial court erred in refusing to give to the jury, the instruction requested by this plaintiff in error, to render a verdict in said cause in her favor and against the plaintiffs therein.

And this plaintiff in error now presents to this Court the facts and the law in support of the foregoing contentions.

Statement of the Case.

In the amended complaint on file herein, it is alleged that by and through the carelessness and negligence of the defendants in said cause, an automobile owned, operated and driven by them collided with an automobile owned, operated and driven by the plaintiffs, causing the damage therein referred to. In the answer of this plaintiff in error, the allegations of said amended complaint are denied and there is stated as a special defense that while said plaintiff in error was the owner of the automobile which collided with that of the plaintiffs she did not have, at the time of the accident in said complaint alleged, any management or control thereof, and was not riding therein; that at the time of said accident her said automobile was in the sole management and control of the defendant Adrian, and was being operated and used by him solely and only for his own personal purposes, and not for her, or in connection with any of her business or affairs, and in violation of her instructions to him.

Amended Complaint, paragraphs V and VI, pages 3 and 4 of Transcript;

Answer to Amended Complaint, pages 12 to 21, inclusive, and see particularly third defense, pages 19 and 20.

At the trial of the case, the only evidence introduced which in any way connects this plaintiff in error with the accident and injuries complained of in plaintiff's amended complaint is that of the

plaintiff herself, that of the defendant Adrian, and that of one Genevieve Johnson; and we respectfully submit that that testimony shows without any conflict whatever the following facts:

1. That the automobile of plaintiff in error which it is alleged collided with the automobile of the defendants in error was not at the time of said collision in her possession or under her management or control, but was in the sole and exclusive management and control of and was being used and operated by the defendant Armand M. d'Aleria.

Bottom of page 38 and page 39 of Transcript.

2. That at the time of said collision the automobile of said plaintiff in error was not being used or operated by the defendant Armand M. d'Aleria in the transaction of, or in connection with any business or affairs of, said plaintiff in error.

Page 50 of Transcript.

3. That at the time of said collision said automobile of plaintiff in error was being operated and used by the said defendant Armand M. d'Aleria solely and only for his own personal purposes.

Page 50 of Transcript.

4. That at the time of said collision said automobile of plaintiff in error was being operated and used by the said Armand M. d'Aleria for his own personal purposes, after he had been instructed by this plaintiff in error to take the same to the garage where she kept it.

Page 48 of Transcript.

5. That at the time of said collision the said Armand M. d'Aleria was not in the employ of this plaintiff in error as a chauffeur or to have any management or control of her said automobile, but solely and only as a musician, and that in operating and using said automobile, he was not acting within the scope of any employment in which he was engaged by plaintiff in error.

Bottom page 50 and top of page 51 of Transcript.

The entire testimony of these witnesses will be found on pages 38 to 56, inclusive, of the transcript of record on file herein; and we respectfully submit that in the light of the law applicable thereto, which is hereinafter referred to, there is no justification whatever for the verdict rendered by the jury in this case against this plaintiff in error.

Law of the Case.

I.

THAT THE EVIDENCE INTRODUCED AT THE TRIAL OF SAID CAUSE WAS, AND IS, INSUFFICIENT TO JUSTIFY THE VERDICT OF THE JURY IN FAVOR OF THE PLAINTIFFS THEREIN AND AGAINST THIS PLAINTIFF IN ERROR.

That the verdict of the jury based upon the evidence to which we have referred receives no justification whatever in law, we respectfully submit is conclusively established by the following authorities:

1. **General principles of law which are applicable to the facts:**

"Master not liable where servant acts outside of the scope of his employment and authority.—The rule, moreover, implies that the master will not in any case be liable for wrongs committed by the servant while not acting about the master's business; or, what is substantially the same thing, while not acting within the scope of his authority. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life, men are constantly obliged to act by others; but no one could venture so to act, if the mere circumstance that he employed another to act for him without any general or particular business made him an insurer against all wrongs which such person might possibly commit during the period of such employment. The law does not even put a father under such an onerous responsibility in respects of the torts of his minor child, nor was the master so answerable for his slave; although upon grounds of public policy a husband is at common law liable civiliter for the torts of his wife, and will not be heard to deny that she acted under coercion when the act was done in his presence. But in other cases, where the relation of master and servant subsists by virtue of contract, and the servant instead of doing that which he is employed to do does something which he is not employed to do at all, the master cannot be said to do it by his servant, and the maxim *qui facit per alium facit per se,* does not apply. In other words, if the servant steps aside from the master's business, for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be deemed to have been for the time suspended; the act will be treated as the per-

sonal act of the servant, and he alone will be responsible for it."

I Thompson on Negligence, Sec. 525.

"Test by which to determine whether servant acts within the scope of his employment. The test by which to determine whether the master is liable for the tortuous acts of his servant is not whether it was done during the existence of the employment, that is to say, during the time covered by the employment, but whether it was done in the prosecution of the master's business. Upon this subject, it has been said: 'In determining whether a particular act is done in the course of the servant's employment, it is proper first to enquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master *pro tempore,* the master is not liable. If the servant steps aside from the master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended'. Such, variously expressed, is the uniform doctrine laid down by all authorities."

I Thompson on Negligence, Sec. 526.

"When the owner is not liable for injury caused by his automobile. It is well settled that the master is not liable for the acts of his servant done outside of the scope of his employment.

So, the owner of an automobile is not liable for damages caused by its negligent operation when he was not in the possession or control of the machine, and the operator was not acting as his servant at the time of the accident.

Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master.

If the act was done while the servant was at liberty from his service and pursuing his own ends exclusively, the master is not responsible; even though the injuries complained of could not have been committed without the facilities afforded by the servant's relation to his master.

Thus, where a servant was on a private pleasure trip of his own, and was using his master's automobile, with the master's knowledge and consent, and while driving the same on the public streets negligently ran into and injured a person, the servant, and not the master, was liable.

A complaint which alleged that the plaintiff was injured by the negligent operation of an automobile owned by defendant and operated by a named chauffeur, but which did not allege that the chauffeur was a servant of the defendant, and acting in that capacity at the time, was held not to state a cause of action.

An automobile is not such a dangerous instrumentality that the owner is liable for its mere use by a chauffeur for purposes purely his own; nor is the owner liable merely because of his ownership of the car, nor because his car was operated by his chauffeur.

So, the owner of an automobile not in the possession, control, or management of it, and the chauffeur of which was not acting as his servant, at the time it is negligently caused to injure another, is not liable therefor.

Where the servant engages in some independent purpose, not connected with the service for which he is employed, the master cannot be held responsible for his conduct.

> In the delivery of an opinion in a late case it was remarked that, 'It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile be affixed to the owner thereof, irrespective of the person driving it, but the law does not so provide'."
>
> Sec. 1038, Berry on Autos, Third Edition, and numerous cases cited.

Stevenson v. S. P. Co., 93 Cal. 558:

In this case it was held:

> "When a servant acts without any reference to the service for which he is employed and not for the purpose of performing the work of his employer but to effect some independent purposes of his own, the master is not responsible for either the act or omission of the service. The test of the master's responsibility for the act of his servant is whether or not the act was done in the prosecution of the business that the servant was employed by the master to do or in the execution of the authority given by the master and for the purpose of performing what the master has directed, and if so the master will be responsible whether the wrong done be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

Clark v. A. T. & S. F., 164 Cal. 363:

In this case it was held that a promise of the engineer of the railroad company to a fireman that he would stop at a place where he had no right to stop, and let the fireman off the train, was a promise to make which he had no authority and that said engineer failing so to do and the fireman, thinking that

he would stop, having jumped off the train and injured himself, created no liability against the railroad company.

2. Automobile cases where these principles are applied.

A. Cases decided by Courts of States other than California.

Clark v. Buckmobile, 94 N. Y. S. 771:

In this case the general manager of an automobile company took a day off and went out of town. On his return, he telephoned from the depot and requested an employee of the company to come to the depot for him with an automobile. This was done and on the way from the depot an accident happened. Suit was brought against the owner of the automobile and judgment was rendered in favor of the plaintiff. On appeal the judgment was reversed and in the opinion the Court stated, that the evidence showing that at the time the accident occurred the persons using the automobile were not engaged in any business of the company and were not acting within the scope of their employment as employees of the company no liability existed against said company.

Reynolds v. Buck, 103 N. W. 946 (Iowa):

In this case, the defendant's automobile was being used by his son, who was also a clerk in his employ, while off on a holiday. Through the negligence of the son, the plaintiff was injured, and he brought suit against the owner. The Court held that inasmuch as the son was not using the automobile in

connection with the business of his father, but for his own purposes, the father was not liable.

Slater v. Advance, etc., 107 N. W. 133 (Minn.):

In this case, the facts were that a corporation furnished one of its agents an automobile for his own use in expediting defendant's business, and the agent after business hours used the automobile for his own purposes not connected with his master's business. Held the defendant was not liable for an injury caused by the agent's negligence as such use of the automobile was not within the scope of the agent's employment.

Evans v. Dike Auto. S. Co., 101 S. W. 1132 (Mo.):

Here the facts were that the servant of an owner of an automobile was about to leave it at a garage to be sold on commission and at the request of the servant of the owner of the garage retained it until the following day, which was Sunday, so as to enable the owner of the garage to show the automobile to a prospective purchaser. While the garage owner's servant was using the automobile on Sunday, solely for his own amusement and pleasure, by reason of his negligence he was struck by an electric car which demolished the automobile. Held the garage owner was not liable therefor, as his servant was using the automobile for his own pleasure, and not within the scope of his employment.

Stefan v. McNaughton, 124 N. W. 1016 (Wis.):

In this case, a chauffeur employed by the owner of an automobile to care for a machine and operate

it at the request and direction of the owner or any member of his family, used the automobile to go home for his midday meal, and while so doing an accident occurred. Held he was not acting within the scope of his employment and his employer not liable.

Danforth v. Fisher, 71 Atl. 535 (N. H.):

Here it was held that the owner of an automobile is not liable for the act of his chauffeur in colliding with a team on a highway, where at the time of the accident the chauffeur was returning from an errand of his own to reach the place where he had been directed to take the machine at an appointed time.

Fleischner v. Durgin, 93 N. E. 801 (Mass.):

Here it was held that an owner of an automobile who employs his chauffeur to take a car from the garage to a repair shop, is not liable for injury inflicted upon a stranger by the negligent handling of the car by the chauffeur while he was gone on an errand of his own.

Powers v. Arnold, 126 N. Y. S. 839:

Here an automobile was used by a company to carry its employees to their place of employment. At the time of the accident complained of, it was being used by an officer of the company for a pleasure trip. Held the owner of the automobile not liable as the officer was not using it in the course of his employment.

Symington v. Sipes, 88 Atl. 134 (Md.):

Here it was held that the owner of an automobile is not liable for injury caused by a collision of the car with a vehicle on the highway, while said automobile was in charge of the owner's chauffeur, and being used by said chauffeur for his own pleasure.

Reilly v. Connable, 108 N. E. 853 (N. Y.):

Here the owner's chauffeur, after driving the owner about in said owner's automobile, took the automobile to the garage with the intention of putting it up there, when his wife met him, and asked him to go to a meat market and get some meat. He started off for the market, about 1½ miles away, and while using it for his own purposes an accident occurred. Held that the owner was not liable, even though the chauffeur had taken and used said automobile by and with the knowledge and consent of said owner.

Hartnett v. Gryzmish, 105 N. E. 988 (Mass.):

In this case, the plaintiff was injured by a collision between an automobile of the defendant, driven by his chauffeur, and a bicycle upon which plaintiff was riding. The chauffeur had taken the car from the garage at noon to go to his home for dinner and, after having eaten his dinner was going from his house to the house of the defendant in order to take the defendant's mother out for a drive, when the collision occurred. The trial Court ordered a verdict for the defendant and the Supreme

Court affirmed it on the ground that at the time of the accident the chauffeur was not acting as an employee of the defendant.

Miller v. National Auto S. Co., 177 Ill. Appeal 367:

In this case it was held that where the president of a corporation engaged in selling automobiles was driving one of its cars to his home after business hours and ran into a truck injuring the plaintiff and it was shown that he was not at the time engaged in the business of the corporation or within the scope of his employment, that the corporation was not liable, and the Court further held in this case that to hold a master liable for a tort committed by his servant, it must appear that at the time of the injury, the servant was engaged in the master's business and not upon some private personal matter of his own; that is, the injury must have been inflicted in the course of the servant's employment.

Bursch v. Greenough, 139 Pacific 870 (Wash.):

Here an employee of the defendant, after business hours, took one of the company's motor trucks without permission and took a ride therein solely for his own pleasure, and while so doing an accident occurred. Held he was not acting within the scope of his employment.

State v. Benson, 100 Atl. 505 (Md.):

Here one Soper, an employee of the defendant, was instructed by a superior employee to take defendant's automobile from the garage to the place of

business of defendant each morning and in the evening to take it back to the garage. On the evening of the accident, Soper took another employee in the car with him and ostensibly started to the garage with the car but instead of going to the garage with it, he went on down to the city where he and his associate had their dinner. On their return an accident occurred. Held the owner of the car was not liable because the employees were not acting within the scope of their employment.

Goodrich v. Musgrave, 135 N. W. 58 (Iowa):

Here it was held that where a man was allowed to take an automobile with a view to showing it to a possible purchaser, and, after having done so without selling it, to keep it several days without further authority and during which time while using it for his own purposes he negligently injured the plaintiff, there was no such relation of agency or of master and servant as would make the owner liable.

B. Cases decided by the Supreme Court and the Appellate Court of the State of California.

Stoddard v. Fiske, 170 Pac. 663 (35 Cal. App. 60):

Here the driver of a loaned automobile was arrested for speeding and taken to a police station. His friend, riding with him, took the automobile to go to the central police station to deposit bail and secure an order for the driver's release, and, returning from such errand, ran into and injured a woman. Held the arrested driver was not liable for the injury.

Mullia v. Ye Planary Bldg. Co., 32 Cal. App. 6 (160 Pac. 1008):

In this case, it was held that a building company is not liable for the act of its superintendent of construction in running an automobile furnished him by the company for use in the company's business into a taxicab where such collision occurred while such employee was returning at an early hour in the morning from a country club to which he had driven after the theatre. In this case the Court quoted with approval the following language:

> "The test of the master's responsibility for the act of his servant is whether or not the act was done in the prosecution of the business that the servant was employed by the master to do or in the execution of the authority given by the master and for the purpose of performing what the master had directed."

Mauchle v. Panama-Pacific etc., 37 Cal. App. 715 (174 Pac. 400):

In this case it was held that the Panama-Pacific International Exposition Co. was not liable for personal injuries sustained by a pedestrian from being run down by an automobile owned by the company and negligently driven by the superintendent of the grounds, where at the time of the accident the superintendent was on his way home with the machine from the exposition grounds, the machine remaining at his home until it was returned to the grounds where it was usually kept all night; since, under such circumstances, such superintendent was

not using the machine at the time of the accident upon any business or affair of the exposition company.

Martinelli v. Bond, 42 Cal. App. 209 (183 Pac. 461):

In this case it was held that the owner of an automobile was not responsible for an accident which occurred while it was being used by the manager of said owner's business, but not within the scope of his employment as such manager. In the opinion of the Court the following language is used:

> "The test of the owner's liability for the tortuous act of his employe while driving the former's automobile is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The very basis of the rule *respondeat superior* as applied to automobile accidents is that the driver of the machine is acting for the owner and not for himself personally at the time of the accident. As soon as the driver steps aside from the owner's business and interest upon the performance of some independent purpose of his own, he ceases to act as agent of the owner and the latter's responsibility for his acts terminate.
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> * * * * * * * *
>
> Upon principle and authority, neither the ownership of the automobile by appellant, nor the fact that the use and care of the same were intrusted by appellant entirely to the defendant Noonan renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with appellant or his business."

In this case it was contended that as a *prima facie* case was made against Mr. Bond by showing that he was the owner of the automobile in question, that plaintiff was entitled to a verdict, but in passing upon this the Appellate Court uses the following language:

> "It is further contended by respondent that he made a prima facie case against the appellant by proof of the latter's ownership of the automobile and the fact that the driver Noonan was his employe at the time of the accident. The presumption arising from such prima facie case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. (Maupin v. Solomon, 41 Cal. App. 323 (183 Pac. 198); Brown v. Chevrolet, 39 Cal. App. 738 (179 Pac. 697).) In this case there is no conflict in the evidence as to the fact that at the time of the accident the automobile was in use by the employe for his personal pleasure. Uncontradicted proof of that fact dispelled the presumption of liability on the part of the owner."

Hirst v. Morris, 187 Pac. 770 (Cal.):

Here it was held that where a chauffeur who had purchased an automobile from his employer to be paid for in installments and to be used in the employer's business advertising and selling its products, had no samples or advertising matter with him and no duties to perform when he drove to his home in another town where he collided with plaintiff, he was not acting within the scope of his employment so as to render the employer liable.

Fahey v. Madden, 206 Pacific 128 (California Appellate Court):

Here it was held in an action for damages for personal injuries caused by being struck by a borrowed automobile, that the inference of agency between the owner of the automobile and the borrower arising from the former's ownership, and the permissive use of the automobile, and creating a prima facie case of agency, does not create a substantial conflict as against clear, positive and uncontradicted evidence to the contrary; and under such circumstances it is error to submit the case to the jury as far as the liability of the owner of the automobile is concerned.

Maupin v. Solomon, 41 Cal. App. 323:

In this case the following language was used by the Court:

> "It is not denied, as testified to by the witnesses introduced by appellant, and corroborated by the surrounding circumstances, that at the time of the accident Solomon was engaged in a pursuit wholly his own, and that such use of the automobile was without the consent of and against the instructions of appellant. Nor is it disputed that the accident was the result of the negligence of Solomon. But plaintiff's contention in support of the judgment is that when he proved that the automobile belonged to the appellant and was being operated by its employee at the time of the collision, a presumption arose that the employee was acting within the scope of his employment, and that such presumption remained in the case in spite of the clear, positive, and

uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal.

With this position we cannot agree. The inference relied upon by respondent cannot be indulged under the circumstances of this case. It must yield to the direct and unequivocal evidence rebutting such inference. 'Presumptions' such as the one relied on here, 'are allowed to stand not against the facts they represent but in lieu of proof of facts, and when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply overcome and dispelled'. (Savings & Loan Soc. v. Burnett, 106 Cal. 514 (39 Pac. 922).) The authorities in this state abundantly support this view. (Freese v. Hibernia etc. Soc., 139 Cal. 392 (73 Pac. 172); King v. Hercules Powder Co., 39 Cal. App. 223 (178 Pac. 531); Mullia v. Ye Planary Building Co., 32 Cal. App. 6 (161 Pac. 1008); Mauchle v. Panama Int. Exp. Co., 37 Cal. App. 715 (174 Pac. 400).)

The very recent case of Brown v. Chevrolet Motor Co. of California, 39 Cal. App. 738 (179 Pac. 697), in an essential respect is like this case. There a travelling salesman employed by the defendant borrowed its automobile for a pleasure excursion, and while so using it injured the plaintiff. There, as here, the plaintiff contended that he had made out a prima facie case when he had shown that the automobile belonged to the defendant, and that it was the province of the jury to weigh any evidence in conflict therewith; but the court held that a nonsuit had been properly granted, and, quoting from the case of Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435 (Ann. Cas. 1918 B, 540, 113 N. E. 507), said: 'The presumption growing out of a prima facie case

> * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely on it.
>
> In the last analysis respondent's position is in effect that, granting the evidence introduced by appellant rebutting the presumption relied upon is convincing and uncontradicted, it merely creates a conflict in the evidence, and that a finding of the jury in accordance with the presumption is under those circumstances supported thereby. This we think is not the law.
>
> The judgment is reversed."

Gouse v. Lowe, 41 Cal. App. 715:

Here it was held, as seen by the syllabus in the case, which in every way is supported by the facts in the decision, as follows:

If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he is using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reasons of his relations to his master.

Where the servant takes his master's machine for a junketing or business trip of his own, the trip is not complete until his return to the point of de-

parture, or to a point where in the performance of his duty he should be.

While ordinarily the question of whether or not the act was within the scope of the servant's employment should be submitted to the jury, where the only evidence is that at the time of the injury the servant was upon a trip for his own purposes contrary to his master's orders, a motion for a directed verdict should be granted. It is only where reasonable men may differ in regard to the facts that a case should go to the jury. If the facts are admitted, or are susceptible of but one meaning, it becomes the duty of the judge to declare the law upon the admitted facts.

C. As to cases decided by the Federal Courts.

From the examination we have made, while there are many cases decided by the Federal Courts to the effect that to hold the master for the acts of his servant, it must be shown that the servant was acting within the scope of his auhority, we have been able to find but one case dealing with the liability of the owner of an automobile, which is as follows:

Patterson v. Kates, 152 Fed. 481:

In this case the facts were as follows: The defendant owned an automobile, which broke down on the way from Atlantic City to Philadelphia, and which he then left in charge of his driver, with instructions to repair it, and bring it to Philadelphia. After the driver had reached the Delaware River,

and while waiting for a ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, he came into a collision with a horse and wagon on the highway, by which plaintiffs were injured. Held that, under such facts, the defendant was not liable for the injury.

3. **Even though the automobile of this plaintiff in error was being used by the defendant Armand M. d'Aleria at the time of the accident complained of, by and with her consent (and it will be remembered that she not only testified that she instructed him to take it up to the garage and leave it there [bottom of page 40 of transcript] and the defendant d'Aleria admits that he was so instructed by her, but told her that he was going down to Market Street, and then would take the car to the garage [page 48 of transcript]) she would still not be liable for any negligence upon his part.**

On this subject, see the following authorities:

A. Cases decided by Courts other than those of the State of California.

Davies v. Anglo Auto T. Co., 145 N. Y. S. 341:

Here it was held that where the owner of an automobile permitted his chauffeur and certain companions to use it for pleasure, and, while so doing, the plaintiff was injured by the chauffeur's negligence, the owner was not liable.

Reilly v. Connable, 108 N. E. 853 (N. Y.):

Here it was held that the fact of the defendant having given to the chauffeur the right to use

defendant's automobile for the purposes of said chauffeur would not make the owner liable for injuries caused by said chauffeur's negligence in so doing.

Cunningham v. Castle, 111 N. Y. S. 1057:

Here it was held that the master is not liable for an injury inflicted by his automobile while being used by his chauffeur with the knowledge and consent of the master for a private pleasure trip of the chauffeur.

Hartley v. Miller, 130 N. W. 336 (Mich.):

Here it was held that the owner of an automobile is not liable for its negligent use to the injury of a stranger by one to whom said owner had loaned it; the person to whom it was loaned being in full control of said machine at the time of the accident complained of.

Lewis v. Amorous, 59 S. E. 338 (Ga.):

Here it was held that where the owner of an automobile merely permits another to use it, no relation of principal and agent is established, such as to render the owner liable for an injury resulting from the other's negligence in the use of the machine.

Siegel v. White, 142 N. Y. S. 318:

An automobile company is not liable for an injury caused by an automobile while being driven

by an employee to whom it had been loaned for personal use, since he was not at the time acting as the owner's servant.

Armstrong v. Sellers, 62 So. 28 (Ala.):

Here it was held that the owner of an automobile is not in the absence of a statute liable for an injury which occurred while said automobile was being used by a person who was accorded the privilege of using it by the owner when it was not otherwise engaged.

Scheel v. Shaw, 97 Atl. 685 (Pa.):

Here the facts were that the defendant's chauffeur requested defendant to lend to him defendant's automobile to go for his family some four miles away, which permission was granted and on the return trip the chauffeur struck and injured the plaintiff. Suit was brought against the defendant and on defendant's motion nonsuit was granted.

N. B. A very large number of cases are cited in the opinion in this case.

Bogorad v. Dix, 162 N. Y. S. 992:

Here it was held the law does not prohibit the owner of an automobile from lending it to his chauffeur for any lawful purpose and the owner is not liable for damages while the machine is so used.

Ostrander v. Amour, 161 N. Y. S. 961:

Here it was held that the defendant was not liable for injuries caused by the driver of a motor truck belonging to defendant which had been loaned to the driver for purposes entirely outside of defendant's business.

B. Cases decided by the Supreme Court and Appellate Court of California.

Stoddard v. Fiske, 170 Pac. 663 (35 Cal. App. 607):

Here the driver of a loaned automobile was arrested for speeding and taken to a police station. His friend, riding with him, took the automobile to go to the central police station to deposit bail and secure an order for the driver's release, and, returning from such errand, ran into and injured a woman. Held the arrested driver was not liable for the injury.

Brown v. Chevrolet, 39 Cal. App. 728 (179 Pac. 697):

Here it was held that the relation of principal and agent between the owner of an automobile and the driver, making the owner liable for driver's negligence, does not result from the mere operating of the machine by the driver though he is an employee performing duties in another part of the state.

In deciding this case the Appellate Court used the following language:

> "The liability of an owner of an automobile for the negligence of its driver depends

> upon the existence of the relation of principal and agent between the two. This relation does not result from the mere operating of such automobile, hence it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower."

Hall v. Puente, 191 Pac. 39 (Cal.):

Here it was held that the doctrine of *respondeat superior* cannot be invoked unless at the time of the negligent act causing the injury, the servant was engaged in performing a service for the master, or incidental thereto; that where an oil company loaned to its salesman for his own use an automobile which he used in the course of his employment, the consent of the company to such personal use did not render it liable for negligent injuries to a pedestrian.

Spence v. Fisher, 193 Pacific 255 (California Supreme Court):

Here it was held that a father was not liable for the negligence of an adult member of his family who was using the father's automobile by and with the consent of the father. (In this case a great many authorities are cited by Judge Angellotti, who was then Chief Justice of the Supreme Court of California, and rendered the decision in question in support of the law as in said decision laid down.)

We respectfully submit, therefore, in the light of the law as above referred to, and of the facts as hereinbefore set forth and stated:

1. That the evidence introduced at the trial of said cause was, and is, insufficient to justify the verdict rendered by the jury;

2. That the plaintiff in error having requested the Court to instruct the jury to render a verdict in her favor, and against the plaintiffs in said cause, on the evidence introduced, which instruction the Court refused to give, and said plaintiff in error having taken exception to such refusal, she is at this time entitled to have this Court pass upon the question as to whether or not the evidence was sufficient to justify the verdict.

In addition to the foregoing authorities, there is one other case to which we desire to direct the particular attention of the Court and that is the case of Ritchie v. Waller, 63 Conn. 155, upon which the learned judge of the trial Court places so much reliance in the opinion rendered by him denying the motion of this plaintiff in error for a new trial.

That case, we respectfully submit, not only fails to support that opinion, but is squarely in opposition thereto as your Honors will note on a careful reading of the decision rendered therein; for there it is held that

> "Where there is not merely a deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own', the master is no longer responsible for the servant's conduct."

And the evidence introduced at the trial of this case shows without any conflict whatever both an absolute departure by the defendant Armand M. d'Aleria from the course of any employment in which he was engaged by this plaintiff in error—and from the instructions given to him by her—and that at the time of the accident complained of he was in fact "on a frolic of his own". In other words, the facts in *this case* bring it squarely within the law as laid down in *that;* and on the strength of that case alone, the trial Court should have instructed the jury to render a verdict in favor of this plaintiff in error and against the plaintiffs in said cause.

While it is true that in that case the master was held responsible for the acts of his servant, on an examination of the facts there involved, it will be seen at a glance how different they are from those involved in this action.

There the servant was in the act of carrying out the instructions of the defendant at the time the accident complained of occurred, while *here* Armand M. d'Aleria was violating the instructions given to him by plaintiff in error at the time the accident here complained of occurred. *There* the servant of the defendant had gone from defendant's farm at the request of defendant, with a span of horses and wagon, for the purpose of obtaining for said defendant a load of manure, and on the way back to the farm stopped his horses and wagon for a moment in front of a shoe

store into which he went to have his shoes repaired. While he was in the shop the horses started off on a slow trot and, when in front of the premises of plaintiff, one of the wheels of defendant's wagon caught in one of the wheels of plaintiff's wagon and upset it, causing the injury and damage complained of. On these facts, the Court held that at the time of the accident, defendant's servant was acting in the course of his employment, and that the mere stopping for a moment to go into the shoe store was not a sufficient departure to relieve defendant from responsibility for the accident.

But even that decision is against the weight of authority, as will be seen from the cases referred to on pages 8 to 30 hereof, and is in direct opposition to the holding of this Court in the case of Patterson v. Kates, 152 Federal 481, referred to on page 24 hereof. How different are the facts in Ritchie v. Waller from those involved in this action! *Here* the defendant d'Aleria had been instructed by this plaintiff in error to take her automobile from the St. Francis Hotel, which is on the west side of Powell Street between Post and Geary Streets, to the garage at 735 Post Street, which is on the south side of Post Street between Jones and Leavenworth Streets, and instead of so doing he goes in exactly the opposite direction, south to Market Street and thence out Turk Street and Golden Gate Avenue for a ride, and at the time of the accident was at Gough Street and Golden

Gate Avenue, a distance of some seven blocks to the west and six blocks to the south of the garage where plaintiff in error had instructed him to take her automobile—and *on a frolic of his own,* that is for the purpose of taking a ride with his friend Harry Hume, and at the time of the accident was on his way to the Fairmont Hotel and not to said garage.

See bottom of page 48 and page 49 of Transcript.

It would seem to us, however, that the strongest point in favor of the contention of this plaintiff in error that the evidence is insufficient to justify the verdict is the fact that the verdict is in direct opposition to the law as laid down in the decisions referred to on pages 17 to 28 hereof. By those decisions, the law in the State of California is established, and as stated by the Supreme Court of the United States,

> "It is the duty of a Federal Circuit in cases where the State decisions are controlling to take the law as last decided by the highest State court without attempting to determine on the merits between it and a previous contrary decision by the same Court."

Leffingwell v. Warren, 67 U. S. 599;

Mitchell v. Lippincott, Fed. Cas. No. 9665, affirmed in 94 U. S. 767;

Gaugler v. Chicago, etc., 197 Fed. 79.

II.

THAT THE VERDICT OF THE JURY WAS, AND IS, AGAINST LAW.

The verdict, we respectfully submit, that was rendered by the jury in this case, is not only not in accordance with the instructions given to the jury by the Court, but is squarely against such instructions, and because of that fact, said verdict is against law.

Emerson v. Santa Clara County, 40 Cal. 543:

Here it was held, a verdict of a jury in disobedience to the instructions of the Court, even though the instruction itself was not correct in point of law, is a verdict against law.

Sweeny v. Central Pacific, 57 Cal. 15:

Here it was held that where a new trial is asked on the ground that the verdict is against law, and it appears that the jury must either have disregarded the law as given in the instructions of the Court, or else have found a fact wholly contrary to the evidence, the verdict is against law and it is proper to grant a new trial on that ground.

Aguirre v. Alexander, 58 Cal. 21:

On page 30 of the opinion in this case, it is stated as follows:

> "The fact with which we have to deal is that the jury by their verdict disregarded the instructions of the Court; and for that reason alone, it was the duty of the Court to set aside

the verdict whether the instruction was right or wrong."

DeClez v. Save, 71 Cal. 552:

Here the Court held a verdict contrary to an instruction of the Court upon a point of law is a verdict against law.

We might add, however, that the foregoing cases have been modified to the effect that in later cases it is held that if an instruction given to a jury is in fact erroneous, a failure to render a verdict in accordance therewith is not a verdict against law.

The instructions given by the Court to the jury, which we contend are squarely in opposition to said verdict, are as follows:

> "I further charge you, gentlemen of the jury, as a matter of law, that the driver of this car did not interpose any defense in this action, so that, so far as he is concerned, the only question you need to consider is the amount or measure of damages to which the plaintiffs are entitled. The liability of the other defendant depends upon the purpose for which the car was being used at the time of the accident, and upon the relationship that existed between the owner of the car and the driver. Upon this question I charge you as follows:
>
> If you believe from all the evidence in the case that at the time of the accident in the amended complaint herein referred to, the automobile therein mentioned was in the possession of and under the control of the defendant Adrian, and was being operated by him for his own purposes and not in the transaction

> of any of the duties of his employment with the defendant Mrs. Nixon, and that while so operating said automobile the plaintiffs were, or either of them was, injured or damaged, in such case the defendant Mrs. Nixon cannot be held legally responsible for any such injuries or damages. In other words, gentlemen of the jury, the master is liable for the acts of his agent or servant in the course of his employment, and within the scope of the agent's authority, but the master is not liable for acts committed by the agent not in the course of his employment and not within the scope of his authority. If in this case this machine was driven for the purpose of the owner by this driver then she is liable for his acts and for his neglect. If, on the other hand, it was not driven for her purposes, or in her business, there can be no recovery, even though it was used by the driver with her consent."

As to this, the evidence shows, as we have hereinbefore demonstrated, without any contradiction whatever, that at the time of the accident complained of the automobile in question was in the possession and control of the defendant Adrian and was being operated by him for his own purposes; that the owner of said automobile did not then know that it was being used by the defendant Adrian at the time the accident occured; that she never gave her consent to the said Adrian to use said automobile at the time or for the purpose it was being used when the accident in question happened. Therefore, we respectfully submit, the verdict is in direct opposition to the instruction above quoted and such being the case, it was and is against law.

III.

AS TO ERRORS OF LAW OCCURRING AT THE TRIAL OF SAID CAUSE AND DULY EXCEPTED TO BY THIS PLAINTIFF IN ERROR.

The only error occurring at the trial of said cause, and excepted to by the defendant, upon which we desire to rely is that which we respectfully submit was committed by the Court in its refusal to give to the jury the following instruction requested by the said defendant Mrs. Nixon:

> "You are hereby instructed that the plaintiffs above named have failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon you find a verdict in her favor and against the plaintiffs."

This instruction was not given by the Court, and at the conclusion of the instructions which were given by the Court, the following proceedings were had and taken:

> "Mr. MILLER. We desire to take an exception, if the Court please, to the fact that the Court did not give the instruction requested that the jury find in favor of Mrs. Nixon.
> The COURT. Yes."

That instruction, we respectfully submit, was one to which the said defendant Mrs. Nixon was entitled, in view of the testimony presented to the jury to which we have hereinbefore referred, and in view of the law applicable to that testimony, which has hereinbefore been called to your Honor's attention.

In conclusion, we respectfully submit that for all of the reasons hereinbefore set forth, the judgment made and entered in the above entitled cause in favor of the plaintiffs therein and against this plaintiff in error should be reversed, and that the trial Court should be directed to make and enter judgment in said cause in favor of this plaintiff in error and against the defendants in error.

Dated, San Francisco,
September 20, 1922.

MILLER, THORNTON & MILLER,
W. I. GILBERT,
Attorneys for Plaintiff in Error.